

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
AK-WA, INC.,

Appellant,

V.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 86-111

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, the appeal of a notice and order of civil penalty for \$1,000 for purported violations of asbestos handling regulations on and near docks in the Tacoma tide flats, came on for hearing before the Board on October 3, 1986, at Lacey, Washington. Seated for and as the Board were; Lawrence J. Faulk, Chairman (presiding) and Wick Dufford. Pursuant to Chapter 43.21B.230 RCW respondent PSAPCA elected a formal hearing and the matter was officially reported by Gene Barker and Associates.

1 Respondent public agency appeared and was represented by Keith D.
2 McGoffin. Appellant AK-WA, Inc. was represented by its quality
3 assurance manager Tom Drake.

4 Witnesses were sworn and testified. Exhibits were admitted and
5 examined. Argument was heard. From the testimony, evidence, and
6 contentions of the parties the Board makes these

7 FINDINGS OF FACT

8 I

9 The Puget Sound Air Pollution Control Agency (PSAPCA) is an
10 activated air pollution control authority under terms of the state's
11 Clean Air Act, empowered to monitor and enforce federal and state
12 emissions standards for hazardous air pollutants, including work
13 practices for asbestos.

14 PSAPCA has filed with the Board certified copies of its
15 Regulations 1 and 2, of which we take official notice.

16 II

17 AK-WA, Inc. is a ship repair contractor located in Tacoma,
18 Washington, and conducting operations in the area known as Tacoma tide
19 flats. This area is designated as a non-attainment area for the
20 national ambient air quality standards for suspended particulate
21 matter.

22 III

23 On April 28, 1986, a PSAPCA inspector, having received a complaint
24 of "sloppy asbestos removal operations," conducted on a ship being
25

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1 worked on by the appellant. He proceeded to the scene and on the pier
2 next to the NOAA ship "Discover," observed several pipes with asbestos
3 wrap. He delivered to AK-WA's president, a copy of PSAPCA's asbestos
4 handling regulations and a standard notification form regarding intent
5 to remove asbestos.

6 IV

7 April 29, 1986, PSAPCA sent AK-WA a warning letter, following up
8 on the previous day's inspection. It stated in part:

9 Inspector Larry Vaughn contacted you regarding an asbestos
10 handling complaint on April 28, 1986. The investigation
11 determined that you have removed asbestos from ships without prior
12 notification to this agency. You also failed to use certified
13 asbestos workers when asbestos was removed.

14 Inspector Vaughn checked the yard next to the NOAA ship, the
15 "Discover," and noticed insulated pipes on the dock next to the
16 ship. The insulation appeared to be asbestos, and the exposed
17 ends were not wet or encapsulated. This is not an acceptable
18 practice when you are dealing with a hazardous material like
19 asbestos.

20 The letter concluded by advising of the possibility of penalties
21 of \$1,000 per day for non-compliance with asbestos handling
22 regulations.

23 V

24 On April 30, 1986, PSAPCA received another complaint about AK-WA's
25 asbestos removal involving piping and ceiling materials from the same
26 NOAA vessel. PSAPCA inspector Gribbon, thereupon visited the site and
27 observed portions of insulated pipe on

1 the dock. He also observed four large insulated pipes lying in the
2 open south of AK-WA's business offices, a short distance from the dock
3 area.

4 He collected samples of the insulation material and took
5 photographs to verify his observations. Subsequent laboratory
6 analysis showed that the samples (including those from the pipes south
7 of AK-WA) contained substantially in excess of one percent asbestos.

8 VI

9 During the April 30, 1986 inspection, PSAPCA's inspector asked
10 officers of AK-WA about the pipes found south of their buildings.
11 They said they thought they had been left there by another firm, but
12 said AK-WA would assume responsibility for their removal.

13 VII

14 On May 1, 1986, at approximately 10:20 a.m., Inspector Vaughn
15 observed two men working on the pipes lying south of AK-WA's
16 buildings. They were wrapping the pipes with visqueen and enclosing
17 them in red visqueen bags. In the process pieces of insulation were
18 broken off the pipes and left on the ground.

19 The workers identified themselves as employees of AK-WA. While
20 working they wore half-mask respirators with HEPA filters, but did not
21 have proper protective clothing. (tyvek suits). The inspector took
22 photographs of the site.

23 Later that afternoon at about 2:45 p.m., Inspectors Vaughn and
24 Gribbon made a joint visit to the area. More photos were taken.
25

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1 Samples were obtained. Again sample analysis revealed a high
2 percentage of asbestos.

3 VIII

4 None of the asbestos materials observed on May 1 had been wetted.
5 No efforts were made to provide any sort of containment for the site.
6 No warning signs were posted. Access to the work area was essentially
7 unimpeded.

8 PSAPCA's inspectors were of the opinion that the pipes found in
9 the area south of AK-WA had been moved there by AK-WA from the nearby
10 dock and were the same as materials originally observed on the dock on
11 April 28, 1986. AK-WA disputed this, but did undertake to dispose of
12 them. They remained in storage in the company's possession for a
13 number of days.

14 IX

15 On May 13, 1986 PSAPCA delivered Notice of Violation No. 21064 to
16 the appellant.

17 On June 19, 1986, PSAPCA mailed Notice and Order of Civil Penalty
18 No. 6459 for \$1,000 to AK-WA, Inc., alleging three violations of
19 asbestos work practices on May 1, 1986. Feeling aggrieved by the
20 penalty, appellant filed an appeal with this Board which we recieved
21 July 1, 1986.

22 X

23 At about the time of the events detailed above, AK-WA was starting
24 to get involved in a program to upgrade its understanding of and
25

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1 competence in asbestos removal operations. Since then, the company
2 has become well qualified in the field, performing asbestos jobs for
3 the United States Navy under extremely rigorous standards. The
4 company now has certified asbestos personnel on staff and has produced
5 a detailed and demanding quality manual to govern conduct on the job.

6 XI

7 Any Conclusion of Law hereinafter determined to be a Finding of
8 Fact is hereby adopted as such.

9 From these Facts, the Board come to these

10 CONCLUSIONS OF LAW

11 I

12 The Board has jurisdiction over these persons and these matters.
13 Chapters 70.94 and 43.21B RCW.

14 II

15 Asbestos is one of only six pollutants classified federally as a
16 "hazardous air pollutant." Under Section 112 of the Federal Clean Air
17 Act, the term describes a substance which

18 causes, or contributes to, air pollution which may
19 reasonably be anticipated to result in an increase in
20 mortality or an increase in serious irreversible, or
incapacitating reversible, illness.

21 Asbestos then, is very dangerous indeed. It is subject to a
22 special set of procedures called National Emission Standards for
23 Hazardous Air Pollutants (NESHAPS). The threshold for regulation is
24 any material containing more than one (1)% asbestos.

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III

The Legislature of the State of Washington has enacted the following policy regarding cooperation with the Federal government, which reads in relevant part:

It is the policy of the state to cooperate with the federal government in order to insure the coordination of the provisions of the federal and state clean air act (RCW 70.94.510).

IV

Pursuant to this and other legislative authority, the state adopted WAC 173-400-075 (1) which provides:

The emission standards for asbestos, benzene from fugitive emission sources, beryllium, beryllium rocket motor firing, mercury and vinyl chloride promulgated by the United States Environmental Protection Agency prior to October 1, 1984, as contained in 40 CFR Part 61, are by this reference adopted and incorporated herein.

From context it appears that the state regulation is designed to incorporate the NESHAPS work practices mandated federally for handling these substances.

IV

PSAPCA has adopted its own regulations on removal of asbestos which are similar to but in some ways more stringent than the federal/state regulations. PSAPCA regulation I, Article 10. PSAPCA's Board has declared that "any asbestos emitted to the ambient air is air pollution." Section 10.01.

V

The violations alleged in the Notice and Order of Civil Penalty all relate to May 1, 1986. Section 10.04(b)(111)(A),(B), and (C) is specifically cited. The applicable regulatory text reads:

(111) Asbestos materials that have been removed or stripped shall be:

(A) Adequately wetted to ensure that they remain wet until they are collected for disposal; and

(B) Collected for disposal at the end of each working day; and

(C) Contained in a controlled area at all times until transported to a waste disposal site.

Section 10.02 contains definitions including:

(a) "Adequately wetted" means sufficiently mixed or coated with water or an aqueous solution to prevent dust emissions.

(i) "Controlled area" means an area to which only certified asbestos workers have access. . . .

VI

We conclude that of Section 10.04(b) (111)(A),(B) and (C) of PSAPCA's Regulation I, was violated by appellant's activities on May 1, 1986.

VII

Appellant's defense is primarily that since May 1, 1986, they have spent a great deal of time and money to become a qualified asbestos removal contractor, to hire certified workers and to perform correctly and successfully in this area.

VIII

In cases involving civil penalties we review the amount of the penalty assessed in light of factors bearing on reasonableness. The purpose of such penalties is to influence behavior and to deter future violations both by the perpetrator and by the regulated community generally.

Frequently corrective action by the violator is a mitigating factor. In asbestos cases, however, the seriousness of the offense substantially outweighs the influence of after-the-fact reforms. The extraordinary dangerousness of asbestos supports the imposition of significant penalties for the violation of procedures designed to protect against the hazard.

This is particularly true in cases like the present one, where lack of containment heightens the risk of exposure, not just to the workers in the immediate area, but to the public at large.

We think it vital that all persons associated with projects which involve asbestos removal be induced to exercise the highest degree of care in insuring that the risk of harm is minimized.

Therefore, we decide that, in light of the circumstances, the amount of penalty was reasonable and should be upheld.

X

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this.

ORDER


The Notice and Order of Civil Penalty (No. 6459) is affirmed.

DONE this _____ day of February, 1987.

POLLUTION CONTROL HEARINGS BOARD

 2/13/87

LAWRENCE J. FAULK, Chairman



WICK DUFFORD, Lawyer Member

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